HARVARD
LAW REVIEW.

VOL. V. JANUARY 15, 1892. NO. 6.

THE JURY AND ITS DEVELOPMENT.

I.

IN giving an account of early Germanic conceptions and modes of "trial," and their development in English judicature (5 Harv. L. Rev. 45; 4 *ib.* 156–9), I traced them down into modern times, and asked, "What, meantime, had been happening to the jury?" Let me now try to answer that question in some way, such as may be possible within the narrow limits that can be allowed in this magazine. Of the pedigree of the jury, as growing out of certain practices in public administration inherited by the Normans from the Frankish kings and brought to England at the Conquest, something was said in the paper just referred to. I will now attempt, *first*, to trace this earlier history and transmigration more definitely; *second*, when once we find the jury fairly on its legs in England, in the twelfth century, and reach the records, text-books, and, later, the reports, that give material for more accurate judgments, I will endeavor to follow the development of the jury through the later seven centuries to our own time. Such an undertaking must be executed in a very summary manner. It will be easier to treat the matter so, because I am writing with the main purpose of throwing light upon the English "law of evidence," which is the child of the jury, and not of stating fully the history of that institution.

I. 1. "The capitularies and documents of the Carlovingian period," says Brunner (Schw. 84), "have a procedure unknown to the old Germanic law, which has the technical name of inqui-

sitio. The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him. . . . This inquisition . . . was applied both in legal controversy and in administration, and we must observe that the departments of administration and justice were then considerably united." After the conquest of Neustria by Rollo the Norman, in 912, that province, although having new rulers, retained its old institutions. As it has been well observed, where the laws of the conqueror, the Normans, were so nearly related in their basis to those of the region to which they had come, the two "could not long exist by the side of each other. The less cultivated must be absorbed by the other, and the narrower the fundamental difference the quicker the process of absorption" (Schw. 129–30). Thus the Norman law was mainly Frankish law; and with the rest we find there the inquisition.

Where royal power was vigorous, as among the Franks, it required safer and directer ways of settling those matters of fact on which its revenues depended than the rude, superstitious, one-sided methods which were followed in the popular courts. In a capitulary of Louis le Débonnaire, in 829,[1] it is ordered that every inquiry relating to the royal fisc shall be made, not by witnesses brought forward [by the party], but *per illos qui in eo comitatu meliores et veraciores esse cognoscuntur, — per illorum testimonium inquisitio fiat, et juxta quod illi inde testificati fuerint, vel contineantur vel reddantur.* This, it will be noticed, is not merely ascertaining facts, it is determining controversy by a mode of "trial;" taxes are laid, services exacted, personal status fixed, on the sworn answer of selected persons of a certain neighborhood. Such persons were likely to know who was in possession of neighboring land and by what title; they knew the *consuetudines* of the region, the free or servile status of the neighbors, their birth, death, or marriage. An enlightened principle had now come in as regards revenue which was likely to extend and did extend to judicature, for that was only another part of royal administration.[2]

[1] Baluze, i. 673, vi.; Anc. Lois Franc. i. 69; Brunner, Schw. 88, note.

[2] "So intimate is the connection of judicature with finance under the Norman kings that we scarcely need the comments of the historians to guide us to the conclusion that it was mainly for the sake of the profits that justice was administered at all." Stubbs, Const. Hist. Eng. i. 385-6.

Only the crown, the royal or ducal power, could have accomplished so great an innovation as this (Brunner, Schw. 255–62). The popular courts were hopelessly caught in the web of custom; within narrow limits they moved forever round and round in the ancient track. The crown alone could compel parties who wished to abide by the old formal procedure to give it up, or enforce the attendance of the community witnesses who made up the inquest, or compel them to take an oath. The popular law had left it to the parties to produce their witnesses; and the maxim that only royal authority could require a man to take an oath was what made and kept trial by jury the special possession of the royal courts. Only such as received the power by delegation from the crown, as the Church, great men, or royal officials presiding over popular courts, could try in this way. All this is but an illustration of the fact, as Maine has said (Early Law and Custom, c. vi.), that in early times the king was the great law-reformer. Beginning as an aid and supporter of the popular courts, enforcing their decisions, and exercising an "ultimate residuary authority" in correcting their errors, the king administered "that royal justice which had never been dissociated from him . . . [and] was ever waxing while the popular justice was waning. . . . In those days whatever answered to what we now call the spirit of reform was confined to the king and his advisers; he alone introduced comparative gentleness into the law and simplified its procedure. . . . [This] was once the most valuable and indeed the most indispensable of all reforming agencies; but at length its course was run, and in nearly all civilized societies its inheritance has devolved upon elective legislatures."

2. In the latter half of the eleventh century the Normans brought a strong type of this royal power to England. They brought also the inquisition. Through the whole of the next century and more, the growth and use of it in the Norman dominions on both sides of the channel were much the same. But from the beginning of the thirteenth century, when John lost his southern territory to the French, the inquisition, mainly dying slowly out in France, began its peculiar, astonishing development in England. In trying to follow its English history we remark at once that for more than a century there is little clear, authoritative information. We get our knowledge mainly from the scattered accounts of cases in Doomsday Book, and in Chronicles and

Histories. These have been collected by a competent and careful hand in the Placita Anglo-Normannica of Dr. Bigelow.[1] The noble series of extant English judicial records does not begin until 1194 (Mich. 6 Ric. I.)[2] Our first law treatise, Glanville, was written not before 1187.[3] Our existing law reports begin not earlier than two centuries and a quarter after the Conquest, in 1292.[4]

(*a*) During this earliest period there are many illustrations of the use of the inquisition in ordinary administration. The conspicuous case is that of the compilation of Doomsday Book in 1085–6. This was accomplished by a commission, making inquiry throughout England, by sworn men of each neighborhood, responsible and acquainted with the facts. Doomsday is a record of all sorts of details relating to local customs, and the possession, tenure, and taxable capacity of the land owners. "Questions of title to land and services, and disputes over the status of persons were of constant occurrence before the commissioners, and the results are briefly stated."[5] Incidentally much else came in, as where an inquest[6] in their answers relate the proceedings of a litigation in the popular court, and how, upon Ralph's failure to appear on a day fixed by the viscount, the men of the hundred had adjudged (*diiudicaverant*) the land to his adversary. The disputes and offers of proof before the Commissioners themselves are sometimes reported.[7]

Of the use of the inquisition in judicature there is an instance,

---

[1] Boston: Little, Brown, & Co. 1879. "This volume [Preface, p. iii] is not a selection of cases, but contains all, of a temporal nature, that are of any value in the known legal monuments of the period."

[2] Rotuli Curiae Regis, i., introd. i-ii.

[3] *Glanvilla, Tractatusde Legibus et Consuetudinibus Regni Angliae*, Lib. viii. c. 3. A fine is cited here as enrolled on the Monday next after the feast of Simon and Jude, in 33 H. II.; this feast was Oct. 28, 1187. I do not take account of the rather special treatise known as Dialogus de Scaccario, written not before 1176–7. Even while I am writing comes something newly discovered, — "what we may believe to be our oldest legal text-book" (Maitland, in Law Quart. Rev. viii. 75), viz., the "Quadripartitus, an English law book of 1114," edited by Dr. Liebermann (Halle, 1892).

[4] Y. B. 20 & 21 Edw. I.

[5] Big. Pl. Ang. Norm. xlix; Palg. Com. i. 271–3. "Not even an ox nor a cow, nor a swine was there left which was not set down in his records," says a Saxon chronicler quoted by Palgrave.

[6] Ranulf *v.* Ralph, Big. Pl. A. N. 307, citing Doomsday, i. 424.

[7] Illustrations of this sort of thing, taken from Doomsday, may be seen in Big. Pl. Ang. Norm. pp. 37–61, and *ib.* 293–307.

in 1080, or soon afterward (Big. Pl. A. N. 24), when, in order to settle a litigation as to certain lands held of the Church of Ely, turning on the question of who held when Edward the Confessor died, the king directs the summoning of three shires and various nobles, and orders that out of these, several (*plures*) English be chosen to tell, under oath, the facts; and it is directed (with certain qualifications), that matters shall be adjusted according to the answers. Of uncertain date in the reign of the Conqueror, who died in September, 1087, is the case of Bishop Gundulf, of Rochester, *v.* Pichot, Viscount of Cambridge,[1] in which on a great controversy as to whether certain lands belonged to the king or "St. Andrew," the king ordered that it be referred to the judgment of all the men of the county, — in other words, to the county court. The county awarded it to the king. The presiding officer, Odo, Bishop of Bayeux, doubted this award, and directed that the county should choose twelve of their number to confirm it by oath.[2] These retired, and then returned and swore to what had been said by the county court. A year afterwards a monk who had once been steward of the region in question, and knew this to be false, raised some question about it; this resulted in confessions of perjury from the one who led in the oath, and from another; and in the condemnation and punishment of all who swore.[3] This case shows the Anglo-Saxon procedure, that of the Germanic popular courts, viz., judgment by the whole assembly. But it also shows the interference of the king's representative, and a resort to an inquest of twelve, chosen under his orders by the county from its own members, and speaking under oath. In the reign of William Rufus, in 1099[4] we have what has been called "the earliest record of anything like a modern judicial iter by the royal justiciars." It does not appear by what methods the judges proceeded. In another case a

[1] Big. Pl. A. N. 34; s. c. Essays in Anglo-Saxon Law, 374 (with the date 1072–1082), Reeves (Hist. Eng. Law, Finl. ed. 137) refers to this as being "the earliest mention of anything like a jury."

[2] So in the reign of Henry I. (1100–1135) the king in his writ gives express authority to require the oath, if dissatisfied with the unsworn answer. "*Ite et videte divisas . . . et facite recognoscere per probos homines de comitatu et dividere. . . . Et si bene eis non credideritis, sacramento confirment quod dixerint.*" Palg. Eng. Com. ii. 184, note; s. c. Big. Pl. A. N. 139.

[3] Those who had not confessed were adjudged perjured, *quandoquidem ille, postquam alii juraverant se perjurum esse fatebatur.*

[4] The King *v.* The Abbot of Tavistock, Big. Pl. A. N. 69.

writ of William Rufus, of uncertain date, directs the viscount to assemble the shire and take its judgment on a dispute as to lands, and to adjust the matter accordingly. A writ of execution in the same case indicates that it was decided by a jury, — *sicut testimoniata et jurata fuit.*

In the reign of Henry I., in 1122, the king directs that a controversy as to land be referred to the declaration of men of a certain neighborhood. Seven hundred were assembled, and the viscount of Dorset and Somerset presided. Sixteen men swore *se veram affirmationem facturos de inquisitione terrae illius . . . quorum assertioni cuncti adquiescentes . . . sua jura conquerentibus adjudicabant, &c.* The names of those who swore are added. We see here again the hundred court giving the judgment upon the statement of those members who were chosen to swear.[1]

(*b*) With the reign of Henry II. (1154–1189) we reach the period when all this irregular, unorganized use of the inquisition begins to take permanent shape at the hands of a great and sagacious king. Through the text of certain of his ordinances (assises), and through the treatise ascribed to Glanville, the last of his chief justices, we shall soon get more definite instruction. A chronicler describes an early controversy in this reign, of the year 1158 (Big. Pl. A. N. 198), between the men of Wallingford and Oxford, and the Abbot of Abingdon, as to the right to a market. The king, being in Normandy, had been persuaded to forbid the defendant to sell any but small articles until his return. The defendant asserted full rights of market. The king, on further complaint made to him in Normandy, directed the Earl of Leicester (Chief Justiciar from 1154 to 1162) to assemble the county of Berkshire and cause twenty-four of the older men to be chosen to answer on oath; if they should swear that the defendant had full market in the time of Henry I. he should have it, otherwise not. This resulted in favor of the defendant. The plaintiffs then went to the king, who had returned, and complained that this oath was false, and that among those who swore had been some of the defendant's men. The king thereupon ordered an assembly of the Wallingford men and of the whole county of Berkshire at Oxford, before the justices, and that oath should be made to the truth by the

[1] Palg. Com. ii. 183; Big. Pl. A. N. 119.

older men chosen by both sides (*ex utraque parte*), excepting that none should belong to the Abbey. At this assembly the jury were separated (*congregati . . . universi, et segregati qui jurarent*), and they differed — the Wallingford men swearing that there was only a market for bread and ale, the Oxford men for more things, but not a full market; and the men of the county, that it was a full market, with possibly one exception. The Earl of Leicester, who presided (*qui justitia et judex aderat*), was unwilling to give judgment on these differing statements, but reported matters to the king, adding the information that he himself had lived at Abingdon when he was a boy, and that he had seen a full market there in the time of King Henry I. This satisfied the king (*tanti viri testimonio delectatus*), and he decided in favor of the defendant.

(*c*) But we had better leave now these unauthoritative reports of the chroniclers[1] and wait, as regards cases, until solid ground is reached in the judicial records, half a century later. Meantime it will be profitable to consider two or three things.

(1.) It is interesting to remark how the English kings, in their capacity as Dukes of Normandy, were using there this same machinery. While they had brought it to England, they had also left it at home.[2] Dr. Brunner speaks of having carefully examined many Norman documents of the twelfth century, little studied before and never printed, and remarks (Schw. 135) that they enable one to contradict the view that Anglo-Norman law had taken the lead and Norman law followed. Up to Glanville the English law was constantly fructified from the Norman. Henry was Duke of Normandy before he was Justiciary and then King of England. It was not, he adds, until near the end of the union between the two countries (in 1205) that England took the lead. It is not surprising, then, to find that Henry II. began the work of developing and organizing the inquisition as Duke of Normandy before he came to the English throne, and as early as the

[1] The chroniclers preserve many valuable documents. As regards their narratives we have to remember their bias and their ignorance of technical law, recalling Coke's warning at the beginning of the third volume of his reports: "And for that it is hard for a man to report any part or branch of any art or science justly and truly which he professeth not, and impossible to make a just and true relation of any thing that he understands not, I pray thee beware of chronicle law," etc.

[2] Brunner, Schw. 148, 207–8.

year 1152.[1] This work lay in establishing it as a right to have this method of proof in certain classes of cases, and in making it obligatory. Before this, it had been granted merely as matter of royal favor in particular instances; it now became, in some cases, matter of right to have the king's writ ordering it.[2] The phrase now became "recognition" rather than "inquisition," — the two terms in reality importing two aspects of the same thing, one, the inquiry, the other, the answer.

These "recognitions" were so many new modes of trial on particular questions, established by a dead lift of royal power. In the case of the "great assise" this trial was optional with the tenant, but not with the demandant. As regards the other recognitions they were required, in specified sorts of cases, — equally obligatory upon both parties. In theory, such recognitions might have been established in other cases, *e. g.*, in criminal matters, by the same authority. If one should be inclined to wonder why this was not done he should bethink him of the extraordinary nature of the actual achievement. The real wonder is that so much was done; for the introduction of a compulsory procedure of this sort was very foreign to the conceptions of the older law. By that, men had "tried" their own cases. To put upon a man who had the right to go to the proof, instead of the *probatio, defencio, purgatio,* of the older law, where he produced the persons or the things that cleared him, the necessity of submitting himself to the test of what a set of strangers might say, witnesses selected by a public officer,— this was a wonderful thing.[3]

It was a portentous thing that any ruler should set himself above the old *lex et consuetudo.* Nearly a century and a half later, where we find the king claiming this power, we see also how firmly he is resisted. In 1291–2 it was sought, in ascertaining certain facts, to put some great men to their oath. They all

[1] Brunner, Schw. 300–304. Brunner here makes the interesting remark that "the need of innovations must have already made itself felt, for the reason that a dangerous rival to the rude and inelastic procedure of the temporal courts was growing up, in the canon law. . . . It may be therefore be regarded as no mere coincidence that Henry II., the reformer of procedure, was the man who first succeeded in forcing the ecclesiastical jurisdiction into narrower limits." See the remark of Bereford, J., in 1303 (Y. B. 31 Edw. I., 492).

[2] Brunner, Schw. 304–5.

[3] A friend reminds me of the many proofs, such as outlawry and distress, that survived even to modern times, of the inability of the old law to compel a man directly to submit to judicial authority.

answered that it was unheard of that they or their ancestors should be compelled to take an oath. It was set forth to them that in many cases, for the common welfare, the king is above the *leges et consuetudines in regno suo usitatas;* and thereupon many times was the book held out to them, but they refused. (Pl. Abb. 227, col. 2.) In old times this denial of the *king's* power of compulsion was a denial of such power anywhere. And it is in this sense probably that we are to understand Horne, in the "Mirror," a little later (c. v. s. 1), when he said, in enumerating abuses: "*La primier et la soveraigne abusion est que le Roy est oustre la ley.*" Horne thought it an abuse that one shouldn't be allowed to try his case by battle or the ordeal. He says this in terms. And again, as to a class of criminal cases: "It is an abuse that the justices drive a true man to be tried by the country when he offers to defend himself against the approver by battle."

(2.) Of the phrases that we meet so often, *recognitio* and *assisa*, some illustration may be convenient. The solemn declaration, in certain matters affecting the clergy, made in 1164 and ordinarily called the Constitutions of Clarendon, is itself styled, in the document, *ista recordatio vel recognitio;* while in chapter ix. it provides for settling certain cases *recognitione duodecim legalium hominum.* In the Assise of Northampton (1176), at § 4, relating to the writ of *mortdancestor*, it is directed that the justices cause a *percognitionem* to be taken by twelve lawful men, *et sicut recognitum fuerit ita*, etc.

The word "recognitio," meaning thus a solemn acknowledgment, declaration, or answer, came to be mainly limited to "the inquisitions which under the ducal ordinance (*secundum assisam*) were started by a ducal writ."[1] Of the term "assise," Brunner (Schw. 299) says, "In England the technical expression 'assisa' got established for recognition in the narrower sense. Assisa means, in the first place, the *thing*, the assembly, as well judicial as legislative. In its extended sense, it means what belongs to such an assembly, the judgment or the ordinance. As to these specific assises which introduced the recognitions, the term 'assise' has passed over to them." Of the use of the word "assisa" as meaning the ordinance itself, we see illustrations both in the title and the text of the assises of Clarendon and Northampton,[2] of the Assise of Arms

[1] Brunner, Schw. 293–4. And see a French document of 1267, specifically giving this meaning to the word, *ib.* 294–5.

[2] Ass. North. s. 5.

(1181) and the Assise of the Forest (1184). *Item justitiae . . . faciant fieri recognitionem de dissaisinis factis super assisam, etc. Haec est assisa . . . de foresta, etc.*[1] On the other hand, the use of it in the sense of a particular remedy, or form of action, or mode of proceeding, and also in the sense of the tribunal, the recognitors, is sufficiently illustrated if we recall the Magna Assisa, or the several assises of Novel Disseisin, Mortdancestor and the rest, or the common expressions, *cadit assisa in juratam* and the like.

(3.) These ordinances of Henry II. (or, perhaps, as it has been conjectured, only a single ordinance applicable to a variety of cases,) are not preserved; but the character of them as acts of royal legislation sufficiently appears in the ordinances already named,[3] as well as in Glanville[4] and elsewhere. Of the proceedings under them, also called assises and recognitions, Reeves (Finl. ed., i. 223–232), following Glanville, or rather paraphrasing him with comment, mentions eight. Of these only two, those of mortdancestor and novel disseisin, went on under original writs. That these proceedings originated with Henry II. is neatly indicated by a charter of King John, granted in 1202, to the church of Beverly, and recited in a later *Inspeximus*, confirming the rights of that church as against any *assisas vel recognitiones vel constitutiones postea factas;* so far as recognitions or assises are necessary as touching what belongs to the *praepositus* of Beverly, they are to be held in his court, where such matters were pleaded *tempore regis Henrici patris nostri, vel tempore Henrici Regis avi patris nostri, antequam recognitiones vel assisae in regno nostro essent constitutae.*[5] The assises or recognitions, *i. e.*, the inquisitions provided for by royal ordinance, compulsory and obtainable as of right, existed, as was said before, only in a limited number of cases. But the old method of obtaining this mode of relief by special permission in other cases, still held; and it was had by consent. Having regard to the powerful favor of the crown, and to the experience of the advantages of this national mode of determining questions of fact, as compared with the duel and the old one-sided formal proof, one might easily guess

[1] Ass. Forest. See also Brunner, Schw. 302.

[2] Reeves, Hist. Com. Law (Finl. ed.), 139, 185, 187 and note, 223.

[3] Stubbs, Charters (6th ed.), 135, 140, 150, 156.

[4] ii. c. 7, and c. 19, and xiii. c. 1.

[5] Houard, Anc. Loix, ii, 287–8; cited by Brunner, Schw. 301.

at the great and rapid extension of it that followed. Questions raised by the *exceptio*, and other incidental matters, were largely disposed of in this way, either by consent of parties or order of court; but to some extent the body of men thus procured was in early times distinguished by a different name from that which assembled under the king's ordinance; it appears as the *jurata*.[1] Where the ordinance did not extend, and where a party would not consent to a *jurata*, the old formal methods of proof prevailed; and some of them continued for centuries.[2] But this again, among other causes, led to a resort to new forms of action, and in these the only mode of trial was the jury. By its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, it grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed.[3]

(4.) Some further mention should be made of the fragmentary legislation of this reign.[4] In the Constitutions of Clarendon, in 1164, — *ista recordatio vel recognitio cujusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum*, — matters between the king and the church were regulated. In c. 1 controversies about presentation and advowson (*de advocatione et presentatione ecclesiarum*) are placed under the jurisdiction of the King's court, — "for the decision of which the assise of darrein presentment was issued, the only vestiges of which [*i. e.*, of the assise or ordinance itself] are preserved in Glanville."[5] In c. vi. a jury of accusation is provided for, — *faciet jurare duodecim legales homines de vicineto . . . quod inde veritatem secundum conscientiam suam manifestabunt.* In c. ix. the assise *Utrum* appeared, — *recognitione duodecim legalium hominum.*[6] In the Assise of Clarendon, in 1166, provision is made for taking inquests throughout England by local juries of accusation, and for the trial of the chief cases by the ordeal. Such juries are also required in the Inquest of Sheriffs (1170), and the Assise of Arms (1181). In

[1] See, however, Mr. Pike's learned consideration of this subject in Y. B. 12 & 13 Edw. III. pp. xxxix-lxx.

[2] Harv. L. Rev. v. 45.

[3] In 1275 (Stat. West. I. c. 12), one accused of felony, and refusing to put himself on a jury, is dealt with as refusing "the common law of the land."

[4] For this see Stubbs, Charters.

[5] Stubbs, Charters (6th ed.), 136.

[6] See Professor Maitland's interesting article in the Law Quarterly Review, vii. 354, 359.

the Assise of Northampton (1176), "a reissue and expansion of the Assise of Clarendon . . . drawn up in the form of instructions to the six committees of judges who were to visit the circuits now marked out," the fourth article provides for continuing in the heir of a freeholder the seisin that his father had, and, if the lord refuse it, for what appears to be the assise of mortdancestor, — *Justitiae . . . faciant inde fieri percognitionem per duodecim legales homines qualem seisinam defunctus inde habuit die quo fuit vivus et mortuus: et sicut recognitum fuerit, ita haeredibus ejus restituant.* Article five requires the taking of assises of novel disseisin; or, to give it just as it is expressed, the taking of a recognition on the Assise (*super Assisam*),[1] of disseisins made since the king came to England after the peace between him and his son.

(5.) To the end of the period now under consideration belongs Glanville. In this book we find frequent mention of the *assisa, recognitio, jurata, patria, visinetum,* as a form of proof, — in other words, of trial by jury. Glanville takes up first the writ of right (Lib. i. c. 5), and after dealing with a variety of preliminary matters, such as the essoins, getting the parties into court and the plaintiff through his declaration, he tells us (Lib. ii. c. 3) that the tenant now has his election to defend himself *per duellum, vel ponere se inde in magnam assisam domini Regis*[2] *et petere recognitionem quis eorum majus jus habet in terra illa.* If the tenant puts himself on the great assise, and the plaintiff assents in court, he cannot withdraw. If he does not assent, he must show a good reason, as that the parties are both descended from the same line as the inheritance;[3] and if this be disputed he must establish it (c. 6). Glanville here pauses (c. 7) to praise the assise in the well-known passage in which this "*constitutio*" is attributed to the royal bounty, and is contrasted with the duel as regards its justice, reasonable-

1 In view of the use of this phrase here and in Glanville, as referring to legislative ordinances no longer extant, it is interesting to notice it in a record of 1201 as meaning the Assise of Clarendon: *Nicholaus purget se per aquam, per assisam,* — "Let Nicholas purge himself by [the ordeal of] water according to the Assise." Seld. Soc. Pub. 1, p. 1. This Assise ("The most important document, of the nature of law or edict, that has appeared since the Conquest," Stubbs, Const. Hist. i. 469) is known to us only because Palgrave discovered it sixty years ago in a MSS. copy of Glanville in the British Museum. Pal. Com. ii. 166.

2 The conception here appears to be that of putting himself on the great ordinance of the King which gave the *recognitio* claimed in the next words.

3 See Stat. *de magnis assises et duellis* (*inc. temp.*) St. Realm, i. 218.

ness, speed, and economy.[1] He goes on to explain that the tenant, appealing from the local court to the king's court, so as to have the benefit of this assise, may have a writ of prohibition to the lower tribunal.

It was when the proceedings under the original writ had taken this turn that the plaintiff might have his auxiliary writ (cc. 10 and 11) for summoning four knights of the county and neighborhood to choose twelve others of the same neighborhood *qui melius veritatem sciant, ad recognoscendum super sacramentum suum utrum M. an R. majus jus habeat.* The details of this election and of the summoning of the twelve knights are then given (cc. 12, 14, 15).

It is remarkable how free from technicality and how liberal in tone are the provisions of this ordinance of the king and the practice under it, as explained by Glanville (c. 12). When once the twelve knights have assembled (cc. 17, 18), it is first ascertained by their oath whether any of them are ignorant of the fact (*rei veritatem*). If there be any such, they are rejected and others chosen. If the twelve differ in their verdict, others are added until there are twelve who agree, on one side or the other. The knowledge required of them is their own perception, or what their fathers have told them, or what they may trust as fully as their own knowledge (*per proprium visum et auditum . . . vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*). The twelve knights may either say, directly and shortly, that one party or the other has the greater right, or merely set forth the facts, and thus enable the justices to say it, — what we call a special verdict. The interesting fact is stated (c. 19) that the king's ordinance provides a punishment for the false swearing of these persons; viz., the loss of all chattels and movable goods, but not the freehold. They are also to be imprisoned for at least a year, and to lose their *legem terrae*, being no longer the *legalis homo*, and becoming for ever infamous.[2]

It will be observed that the writ of right, the only one thus far considered by Glanville, had no necessary relation to the new

[1] Harv. L. Rev. v. 67; Reeves, Hist. Com. Law, Finl. ed. 187–8. An interesting question exists as to whether the word *magna* belongs in this passage. Reeves, i. 187, note; Beames's Glanv. 54, note. Whether it belongs here or not, it is found elsewhere in Glanville, and in our other early books, as designating this particular recognition.

[2] LEGALIS, *in jure nostro de eo dicitur qui stat rectus in curia, non ex lex seu utlagatus, non excommunicatus, vel infamis &c., sed qui et in lege postulet et postuletur. Hoc sensu vulgare illud in formulis juridicis, probi et legales homines.* Spelman, Gloss.

modes of trial; the regular trial was the old one, the duel. It was only when the tenant claimed the benefit of the statute that the case was tried by the inquisition, or, as it is more usually called in this relation, the recognition. The writ which secured this was merely an auxiliary writ of summons obtained by the plaintiff to meet the emergency in his case which had thus developed. But Glanville, later on (lib. xiii. c. 1), speaks in detail of a different thing when he comes to possessory writs: "Now we are to speak of the usual proceedings where seisin only is in question. And since these usually go forward by a recognition, by favor of that ordinance of the kingdom which is called the assise (*ex beneficio constitutionis regni que assisa nominatur*), it remains to speak of the various recognitions." Eight recognitions are then named (c. 2), viz.: *de morte antecessoris, de ultima presentatione, utrum tenementum sit feudum ecclesiasticum vel laicum, utrum seisitus de feodo vel de vadio, utrum sit infra etatem*[1] (c. 16), *utrum seisitus de feodo vel de warda* (c. 14), *utrum presentaverit occasione feodi vel warde, de nova disseisina*; — the writs for these are given in succession, and all but the first and the last are merely auxiliary writs, called out, as in the case of the *magna assisa*, incidentally, in proceedings under some other writ. Glanville also plainly says that in other ways the recognition is reached; as regards incidental points recognitions are ordered, sometimes by assent of the parties and sometimes by the order of the court (*et si que sunt similia que in curia frequenter emergunt presentibus partibus, tunc ex consensu ipsarum partium, tunc etiam, de consilio curie consideratur ad aliquam controversiam terminandam*). In dealing with the first of these writs, Glanville explains, once for all, the procedure. The writ directs the viscount to summon twelve *liberos et legales homines de visineto de illa villa* to appear, ready on their oath *recognoscere si . . . et interim terram illam videat . . .* (*ib.* c. 3). The viscount is to select these men, in the presence of the parties, if they choose to attend (*ib.* c. 5). Only two essoins (excuses for delay) are allowed in any possessory recognition, and none at all in the writ of novel disseisin. In considering various dilatory pleas to which the tenant may resort, it is said that the question of fact thus raised may be disposed of by a resort *ad duellum, vel ad aliam usitatam probationem*. As regards the mode in which the twelve are to arrive at their verdict

[1] In this case the recognition is by eight.

Glanville simply says (c. 11) it is *sub forma prescripta in hoc libro*, — meaning, perhaps, the explanations about the writ of right in the second book. It is only there that he gives any such explanations.

Glanville's last book (xiv.) deals with criminal cases, — *de criminalibus restat tractandum.* Here, as yet, the jury has penetrated little; but here also it has come. The ordinary common-law (*per legem terrae*) mode of accusation is the private one, by appeal, and the ordinary mode of trial is battle or the ordeal; for compurgation in the king's courts seems to have disappeared by the Assise of Clarendon. But sometimes one is accused by "public fame;" *i. e.*, the accusing jury. In this case the judge must inquire carefully into the basis of this accusation *per multas et varias inquisitiones et interrogationes coram justic' faciendas inquiretur rei veritas, et id ex verisimilibus rerum indiciis et conjecturis, nunc pro eo nunc contra eum qui accusatur facientibus.*[1] Sometimes the accused has an election whether to submit to the ordeal, and sometimes he is forced to it; as in homicide, where he has been taken in flight by a pursuing crowd, if this be attested in court by a jury, *si . . . hoc per juratam patrie fuerit in curia legitime testatum* (c. 3; see also c. 6). One may decline battle for the reason of being sixty years old or over, or being maimed. But then he is driven to the ordeal (c. 1).

Glanville often, throughout his work, speaks of referring incidental questions *ad visinetum*, of determining them *per juratam patriae vel visineti.* What has already been said may serve to show that this was sometimes under the king's ordinance (*juxta assisam*) by a recognition, and sometimes that it came about as a consequence of the judge's control over procedure, by agreement of parties, or by the outright award of the court.[2]

II. We now come to the time when there are printed records, and cases can be cited. Henceforward we are on more solid ground, and may hope to trace more clearly the development of

[1] Such was the office, in civil cases, of the secta — to make a charge probable. Harv. L. Rev. v. 47–51. These preliminary inquiries must not be confounded with the trial; Stephen appears to fall into this error. Hist. Crim. Law, i. 259–60.

[2] This was done sometimes by the mere order of the king. In 1200 (Rot. Cur. Reg. ii. 189), an entry on the judicial rolls begins abruptly, *Jurata venit recognitura*, &c. The jury finds that the sons of S. are the inheritors of a certain estate, *ut eis videtur;* and it is added, "*notandum* that this inquisition was made by order of the king, not by judgment of the court *vel secundum consuetudinem regni.*"

things. A student is struck at once with the rapid growth of the new mode of trial during the next century. The evil practice of exacting a large and uncertain fee for granting a recognition, even when it was matter of right,[1] which continued throughout the twelfth century, was forbidden by John's Magna Carta, in 1215. The Barons had demanded in their "Articles,"[2] *Ne jus vendatur, vel differatur vel vetitum sit;* and in art. 40 of the Charter the king had promised "*Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.* Then the multiplication, in civil cases, of new writs and forms of action available as of right, and all of them calling for a trial by jury, gave it a great increase. As to the king's right to issue new writs, the abridgment of the right in 1258, and the enactment in 1285 of that fruitful provision (St. Westm. II. c. 24) whereby the clerks in chancery were empowered to issue new writs in *consimili casu*, — authorizing actions on the case and providing the channels through which a vast proportion of the flood of subsequent litigation has flowed, — I can merely allude to these things.[3] Even without all this and before it, there had been an extraordinary growth; for instance, trespass, occasionally resorted to in John's reign or earlier,[4] became apparently a writ of course about the middle of the thirteenth century; such, at any rate, is the opinion of some of our best scholars.[5] In this, as well as in all cases which were not covered by established rules, the jury was the mode of trial. "And since in a plea of trespass the defendant can hardly escape making his defence by the country, the justice, by consent of parties, shall make inquiry of the truth by lawful inquest," says the Statute of Wales in 1284 (c. xi.).[6] "To avoid the perilous risk of battle it is better to proceed by our writs of trespass than by appeals," says Britton (A.D. 1291–2).[7] In 1304 (Y. B. 32 & 33 Edw. I.

---

[1] Big. Hist. Proc. 187–90.

[2] No. 30; Stubbs, Charters (6th ed.), 293.

[3] See Big. Pl. A. N. Introd. xxviii-xxx.

[4] Big. Proc. 160.

[5] Professor Ames in Harv. Law Rev. iii. 29, note; confirmed by Professor Maitland in his valuable article on the "Register of Original Writs," *ib.* 177–9, 217: "At the end o the Baron's war . . . we suddenly come upon a large crop of such actions."

[6] 1 St. Realm, p. 66.

[7] f. 49; Nichols, i. 123. A learned friend suggests that by the middle of the thirteenth century there were no cases where a defendant on his trial might not regularly have a jury if he applied for it, and no case where a plaintiff might not have it except debt, detinue, and the grand assise,— allowing, of course, for situations where documents were the proper mode of trial.

318–20), battle was offered and accepted in trespass, but the court refused to allow it.

But the inquisition had its most interesting extension, and the one which it will be most profitable to trace, in criminal cases. Of this a very interesting account is given by Brunner (Schw. 469–474). Here, as in civil cases, the incidental questions raised by an *exceptio* were often referred, by consent of the parties, or by the king's grace obtained by the offer of money, to an inquisition. Many instances of such offers for a jury to try the question, upon a special plea in criminal cases, are found in the reign of John. The commonest case of this sort, so far as our printed records show, was the plea, on an appeal, that it was brought maliciously, to disinherit or otherwise injure the appellee, whose innocence is also alleged,—the *exceptio de otio et atia.*[1] These pleas often involved practically a decision of the main question of guilt or innocence. By the Magna Carta of King John (art. 36) such writs were no longer to be sold and bought but given as of right.[2] In this way, then, it seems to have been possible, even before the decree of the Fourth Lateran Council, in this same year of 1215, to apply the jury to criminal cases whenever the accused asked for it. But how if he did not ask for it? The Assise of Clarendon, in 1166, with its apparatus of an accusing jury and a trial by ordeal is thought to have done away in the king's courts with compurgation as a mode of trial for crime; and now the Lateran Council, in forbidding ecclesiastics to take part in trial by ordeal, was deemed to have forbidden that mode of trial, as well in England as in all other countries where the authority of the Council was recognized.[3]

---

[1] Instances of this, in 1200, may be seen in Rot. Cur. Reg. ii. 30, 97, 230, and 265; the last-named case reappears, in 1207, in Seld. Soc. Pub. i., case 54. In this last volume interesting instances, of the years 1202–5, are found, at cases 81, 87, 91, 92. See also case 161, in 1221. In case 79 (1203), on a plea to an appeal, of a previous concord and settlement, the appellee offers two marks to the king for an inquest, and has it.

[2] *Nichil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris sea gratis concedatur et non negetur.*

[3] "The next eyre . . . took place in the winter of 1218–19. The judges had already started on their journeys when an order of the king in council was sent round to them . . . : 'When you started on your eyre it was as yet undetermined what should be done with persons accused of crime, the Church having forbidden the ordeal. For the present we must rely very much on your discretion to act wisely according to the special circumstances of each case.'" The judges were then given certain general instructions: Persons charged with the graver crimes, who might do harm if allowed to abjure the realm, are to be imprisoned, without endangering life or limb. Those charged with less crimes, who

The judges would naturally turn to the inquest. But this had not been used heretofore in criminal cases without the consent of the accused; and the action of the judges took the course of gaining his consent and stimulating it. Somehow or other it eventually became the received opinion that one accused of crime could not be tried by the country unless he should plead and put himself on that mode of trial. It was so in Normandy;[1] and this may well suggest that the fundamental reason of it was one common to both countries; viz., the struggle of the old conceptions as to judicial authority in adjusting themselves to the new procedure. But there was an unsettled time at first, and some persons were tried by jury and hanged who never had consented to the jury.[2] There was ground for this course in the usages of the King's Court in both civil and criminal cases. If the tenant in a writ of right put himself on the grand assise, the question as regards the demandant was not whether he consented, but whether he had a good reason for refusing to consent. (Glanv. ii. 6.) So in the petty assises, there was no choice. As regards exceptions Britton tells us (f. 218 b), *en tels cas soit la assise tourné en juree, et en plusours autre cas, si les parties se assentent, et si noun, soit jugé contre cely qe assenter ne se vodera.* As we saw in Glanville, one might be compelled to the ordeal against his will. In the nature of things it could not really be left to the option of an accused person whether he would be tried or not. It is not strange then to find that the judges, using the large discretion confided to them by the crown after the Lateran Council, sometimes forced a jury upon an unwilling prisoner. The two cases cited by Emlyn in his note to Hale's Pleas of the Crown, which are above referred to, are clear instances of it. Seven cases in Gloucester, however, during the same iter in which these occurred, preserved by Maitland, are, as he says (Glouc. Pl. xxxix.), "provokingly inconclusive."

Maitland's researches among the rolls in preparing the "Select Pleas of the Crown" (A. D. 1200–1225), which make the first volume of the publications of the Selden Society, lead him to make (p. 99, note) the important remark regarding Emlyn's two cases,

---

would have been tried by the ordeal, may abjure the realm. In the case of small crimes there must be pledges to keep the peace. Maitland, Glouc. Pleas, xxxviii.

[1] Brunner, Schw. 474.

[2] Cases of this sort, of the period 1220–1222, may be found in Hale, Pl. Cr. ii. 322, note; s. c. Seld. Soc. Pub. i., cases 153, 157; Maitland Glouc. Pleas, xxix.

that "no other cases to the same effect have as yet been found." Yet Bracton's opinion seems to have been in accord with them. In very interesting passages (Lib. iii. cc. 21, 22), quoted by Maitland, Bracton argues for this doctrine on the analogy of what happens (citing two cases of 1226), in an appeal where the appellant is a woman, an old person, or one maimed. In such cases there can be no battle, and since the Lateran Council, no ordeal; the process is the jury, — *cogendus est igitur appellatus quod se defendat per patriam.* On an indictment, also, after describing the proceedings (143 b), in saying that these forms are to be followed in all cases of homicide, where one has put himself on an inquisition, his expressions are, *sive sponte, sive per cautelam inductus, sive per necessitatem.* None of Bracton's citations in this part of the work, viz. in the treatise *De Corona*, are later than 1231–2, except one of 1262, which appears to be an interpolation, and this is esteemed the oldest part of the book; but the full work is ascribed to the approximate date of 1259.[1] Down, then, to the middle of the thirteenth century, or later, it was thought possible by high authority, as well in criminal cases as in civil, to try a man by jury, or, at any rate, to convict him, whether he consented or not. But the doctrine was contrary to settled ideas, it was not an established one, the precedents were few, and it was supported rather on analogy than any body of direct authority. An obvious mode of compulsion, in case of refusal, was that of treating the party as confessing. There had, indeed, always been cases where one was hanged without any trial at all, as where a man was taken in the fact.[2] In 1222 (Br. N. B. ii., case 136), of two alleged robbers, one puts himself on a jury and is substantially acquitted. The other refuses; but it appears that he was found in possession of part of a tunic lately stolen, and *omnes de comitatu et de visneto* say that he is a thief, and has been in complicity with thieves, that he is not in frank-pledge, and has no lord to vouch for him,

[1] Twiss, Bracton, i. xiv, xv; *ib.* xlviii, citing Güterbock.

[2] Bracton, fol. 137, *et haec est constitutio antiqua, in quo casu non est opus alia probatione;* cited by Maitland at Br. N. B. ii., case 138, — a neat case of the sort, in 1222, where it is adjudged *non potest defendere, suspendatur.* See also the Statute of Wales, s. xiv. (St. Realm, i. 68, A. D. 1284). This sort of thing is indigenous among all barbarous people; see Maine's Anc. Law, c. 10; Anglo-Saxon Laws, *passim.* It is the parent of a certain modern "presumption," on finding one in possession of stolen goods. Harv. L. Rev. iii. 157–8.

and that there is no good thing in his favor; accordingly it is adjudged, "*convictus est, ideo*, etc.," *i.e.*, he is to be hanged. In 1226 (*ib.* iii., case 1724), Henry le Dreys is appealed by an approver in whose company he had been taken. He is not in frank-pledge, and has no lord to vouch for him, and does not offer in any way to purge himself,[1] *et ideo suspendatur*, etc.

There was irregularity and looseness. In 1219 (Br. N. B. ii. 67), the itinerant justices are punished for hanging men without trial, who were not taken with the mainour, had not confessed, and apparently had not put themselves on a jury: they had carried the current practices too far, and applied them to persons who had indeed befriended a near relative who appeared to be a thief, and who, while not confessing, had not satisfactorily denied receiving the stolen goods. The twelve jurors of the hundred had been referred to, and had given them a bad name, had "heard say" that the stolen goods were divided on their land, etc. Whether by reason of this sort of loose practice, or the prevalence of old ideas, or for whatever reason, it seems to have become the rule that standing mute was not confession, and that the accused could not be put on his trial by a jury without his consent. Of course the matter might have been covered by an "assise." But it was not; on the contrary, towards the end of the century we find a remarkable statute which seems to recognize the doctrine that consent was necessary, and provides a punishment (*peine*) for refusal, of a nature to induce consent. The Statute of Westminster the First (3 Edw. I. c. 12) enacts, in 1275, that "Notorious felons, openly of ill fame,

[1] One is said to clear himself (*purgare se*) by a jury, in Br. N. B. ii., case 19; and so elsewhere. It is interesting to notice that our word "trial," and its family, are little used at this time, and the fact points to a very important difference between old and later conceptions. Let any one turn, for instance, to the index to the Parliament Rolls at "Trial," and verify the references. The usual phrases at the period now in question are *probatio, purgatio, defensio;* seldom or never *triatio.* In one form or another *triare* (French *trier*) may indeed be rarely seen in our earlier books, as, *e.g.*, in Bracton, fol. 105 (say, A. D. 1259); Fleta, Book 4, c. 11, s. 4 and 5 (say, 1290), Britton, f. 12 (say 1291–2); and the Mirror, c. 3, s. 34 (early in the next century). In Y. B. 30 & 31 Edw. I. 528 (1302), it is said of challenges to several jurymen, *triebantur per residuos de duodecim.* The phrase grew common in this century. In 1353 (Parl. Rolls, i. 248, pl. 12) we read that if there be a plea between merchants before the Mayor of the Staple, *et sur ceo pur trier ent la verite enqueste ou proeve soit a prendre*, if both are foreigners *soit trie per estranges*, if both are denizens, *soit trie per denzeins*, etc.; and in 1382, the Stat. 6 R. II. st. 1, c. 6, provides that, *rei veritas . . . per inquisitionem trietur.* Everybody knows that in the sixteenth century, *e. g.*, in the Abridgments, it was in as familiar use as it is to-day.

who will not put themselves on inquests for felonies with which they are charged before the justices at the king's suit, shall be put in strong and hard imprisonment (*en le prison forte et dure*) as refusing the common law of the land. But this is not to be understood of persons who are taken on light suspicion." This appears to be the first mention of what came to be known as the *peine forte et dure.*

Of the long continuance of this practice until its abolition in 1772 (St. 12 Geo. III. c. 20, s. 1), and the tardy adoption then, and in 1827 (Stat. 7 & 8 Geo. IV. c. 28), of Bracton's opinion and the method of the cases in 1221; and of the strange and barbarous variations upon this penalty brought about by judges' or jailers' authority, I need not say much. A few words may be interesting. I have given all the language of the statute. In Britton (about 1291–2), we find details which are not in the statute: "That they be barefooted, ungirt and bareheaded, in the worst place in the prison, upon the bare ground continually night and day, that they eat only bread made of barley or bran, and that they drink not, the day they eat, nor eat, the day they drink, nor drink anything but water, and (*il soint en fyrges*) that they be put in irons" (Nichols, i. 26–7). Fleta (lib. i. c. 34, s. 33), a book which the writer of Britton is supposed to have had in his hands, says nothing of putting in irons. In the middle of the next century it was found possible by a woman to live forty days under the penance (Pike, Hist. Crime, i. 211; 4 Bl. Com. 328); so that although a miracle is intimated, in saying of this woman that she lived "without food or drink," it has been supposed that they did not yet *press* the prisoners. But this is probably a mistake; the penance may have been varied in the case just referred to. Pressing appears to be mentioned in the "Mirror;" and in the Cornish iter of 1302 we find what appear to be two cases of this sort, and one or two other cases of the *graunt penance*, in which the full details are not given.[1] The penance is described in the case of John de Dorley and Sir Ralph Bloyho (p. 510) thus: "that he should be put in a house on the ground in his shirt, laden with as much iron as he could bear (*charge de tant de fer cum il poit porter*), and that he should have nothing to drink on the day when he had anything to eat, and that he should drink water which came neither from foun-

[1] Y. B. 30 & 31 Edw. I. 510. See also pp. 498, 502, 531.

tain nor river."[1] In 1406 (Y. B. 8 H. IV. 1, pl. 2), we find Gascoigne, by advice of all the justices, awarding the penalty with further details. Two appealed of robbery and "mute of malice, to delay their death," are to lie on the ground naked, save trowsers, to have put upon them as great a weight of iron as they can bear and more (*tant de ferr et pois come ils puissent porter et pluis*), and to have for food only the poorest bread that can be found, and standing water from the place nearest to the jail, and these only on alternate days, bread only on one day, and only water on the next, — and so to lie till death. In 1474 (Y. B. 14 Edw. IV. 8, 17), on an appeal, the terms of the judgment are given: "Needham went to Newgate and asked judgment *in forma quae sequitur.* That the appellee be remanded to his prison . . . and be put in a cell, and be naked on the bare ground without litter or rushes, or cloth or anything, and shall lie there naked on his back, . . . his head and feet covered, and that one arm be drawn with a cord to one quarter of the cell, and the other to the other quarter, and that one foot be drawn to one quarter of the cell and the other to the other, and that on his body be put a piece of iron as much as he can bear, and more (*un péece de ferre tant come il poit suffre et port sur luy, et pluis*), and the first day after, he shall have three morsels of barley bread without any drink, and the second day he shall thrice drink, without bread, as much as he can of water standing near the prison, and this shall be his diet until he be dead." At Newgate two centuries later, in 1662 (Kelyng, old ed. 27), they had made other changes. Kelyng, C. J., tells us that "George Harley, being indicted for robbery, refused to plead, and his two thumbs were tied together with whipcord that the pain of that might compel him to plead, and he was sent away so tied, and a minister persuaded to go to him to persuade him; and an hour after he was brought again and pleaded. And this was said to be the constant practice at Newgate." This method was sometimes accompanied by the press; at this period also a sharp stone or stake was placed under the prisoner's back. The tying with whipcord was kept up at Newgate at least as late as 1734.[2] At last came the abolition of

[1] Was the original notion that of making the "irons," into which the prisoner was put, heavy enough to keep him down?

[2] Pal. Com. ii. 189–191, Barrington, Obs. on Stat. (2d ed.) 61–66. As is well known there was a reason for enduring this horrid torture in the doctrine that one who was not

all this in 1772, and the adoption then and in 1827 of the rules that had been advocated and a little followed five centuries before.[1] It is impossible to review these facts and not agree with Palgrave when he says: "It is a singular proof of the want of attention to any general principles of legislation that a custom equally foolish and barbarous should have continued so long unaltered. And the subject is one, among others, which shows that the English law . . . must forfeit many of the encomiums . . . which have so long passed current amongst us." [2]

As regards the origin of these singular practices, I venture the conjecture that the *prison forte et dure* of the Stat. West. I. c. 12, in 1275, is to be understood by reference to what Palgrave calls the "temporary ordinance" (Com. i. 266) of the King's Council, in 1219, after the Lateran Council. The judges, as we have seen, were then ordered, as regards the worst cases, to imprison, — but not in such a way as to imperil life or limb, — *teneantur in prisona nostra et salvo custodiantur; ita quod non incurrant periculum vitae et membrorum occasione prisonae nostrae.*[3] The later statute seems to refer to this restraint, and to take it off. It is the bad cases also that this statute purports to deal with, "notorious felons and such as be openly of evil name;" and the order is, that if these persons will not put themselves on the inquest, *soient mises en la prison forte et dure.* Apart from the order of 1219, it was matter of course that those who, according to the ideas of the period, could not be tried without their own consent should still be kept in prison; and it is highly probable that, without any

formally adjudged guilty did not forfeit his lands. Mr. Pike's account (Hist. Crime, ii. 194–5; *ib.* 283–5) of Strangeways' sufferings in 1658, of Burnworth's, in 1726, under nearly four hundredweight, and of John Durant's case, in 1734, are horrible, but interesting.

[1] "For the more effectual proceeding against persons standing mute on their arraignment for felony or piracy . . . s. 1. If [he] shall stand mute or will not answer directly to the felony or piracy . . . [he] shall be convicted, etc. . . . The court shall thereupon award judgement and execution . . . as if . . . convicted by verdict or confession. . . . " (Stat. 12 Geo. III. c. 20) s. 1. "If any person, not having the privilege of peerage, being arraigned upon any indictment for treason, felony or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form be deemed to put himself upon the country for trial. . . . s. 2. If any person, being arraigned for treason, felony, piracy or misdemeanor, shall stand mute of malice, or will not answer directly . . . it shall be lawful for the court . . . to order the proper officer to enter a plea of not guilty. . . ." (Stat. 7 & 8 Geo. IV. c. 28.)

[2] See also Sir J. F. Stephen's observations, in Hist. Cr. Law, i. 300.

[3] Rymer, Foed. (old ed.) 228.

statute for it, some persuasions would be adopted to induce consent. It was so in Normandy, where the prisoner was put on short diet, and where the judges even authorized torture.[1] But the order of 1219 may well have operated as a restraint upon these endeavors. The Statute of 1275 seems to have changed this. Something might now be added to the old imprisonment, and the description of it is found only in these words, *forte et dure*.[2] It is certain that not until after this statute do we hear of the "penance," and then we find it very soon. As might be expected, it varies from time to time. We hear nothing of pressing at first; but seem to find it as early as 1302, and, soon afterwards, this, with the whole matter of the "penance," is the subject of bitter complaint in the "Mirror," a book written in the first quarter of the fourteenth century. It is declared (c. 5, s. 1, pl. 54) an abuse to load (*charge*) a man with iron and put him in penance before he is attainted of felony. Again (c. 5, s. 4), the Statute West. I. is said to be abused in that the penance is pushed so far as to kill people without regard to their condition, when perhaps a man might acquit himself (*se purra per cas aider et acquiter*) otherwise than by the country; and he ought not to be punished till he has been attainted. This book (c. 1, s. 9) declares chargeable with homicide those who kill a man in prison, when he is adjudged to penance by excess of "*peine*."[3]

In entering now upon an effort to trace certain main feat-

[1] Brunner, Schw. 474; Pal. Com. ii. 190; *ib.* i. 268.

[2] For certain *unlawful* practices of sheriffs and jailers, in putting appellees of good fame *en vile et dure prisone*, see Stat. 5 Edw. II. c. 34 (1311).

[3] Palgrave (Com. ii. 189) cites a statement of 1293, in the "Chronicle" of the Priory of Dunstable (ii. 609): *Eodem anno justiciarii itinerantes apud Eboracum valde rigide se gerebant; et quendam nubilem . . . de multis feloniis arrestatum ad poenitentiam statuti posuerunt, quia vere dictum patriae recusavit; et mortuus est in prisona.* Immediately after this a great robbery is mentioned, for which some knights and gentlemen were hanged; *quidam autem eligentes poenitentiam secundum statutum miserabiliter defecerunt.* It will be noticed that the Chronicler refers the penance to the statute. And so the "Mirror" Palgrave (Com. ii. 189) says that at about the period of the "Mirror" the chroniclers "record the fate of many criminals who perished under the infliction." It should be mentioned that Palgrave, in saying that *Bracton* describes the penance, doubtless suffers from a misprint; it should read Brittor. Bracton does not mention it.

I ought at least to refer to the fact that Coke (2d Inst. 179) and Hale (Pl. Cr. ii. 321-2, mention weighty considerations in support of their opinion that the *peine forte et dure* existed before the statute. What I have said would indicate that in a sense this may be so, but not in their sense.

ures of the jury as they appear in several successive centuries, we shall probably find that the matters calling for attention will mainly arrange themselves under two heads: (1) The methods of informing the jury and improving their quality as a body of witnesses whose answers "tried" the case; and (2) the methods of controlling the jury, of preventing improper influence over them, of punishing and checking them, and of reviewing their action. It is these things that have originated or shaped much in our law, and, among other things, our singular "law of evidence."

James B. Thayer.

CAMBRIDGE.

[*To be continued.*]